RECORD AND BRIEFS

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In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

ON MOTION FOR LEAVE TO INTERVENE

Elephant Butte Irrigation District's Reply To Briefs Opposing Motion For Leave To Intervene

STEVEN L. HERNANDEZ
(*Counsel of Record*)
LISA J. HENNE
LAW OFFICE OF
STEVEN L. HERNANDEZ
P.O. Box 13108
Las Cruces, NM 88013
Tel.: (575) 526-2101
slh@lclaw-nm.com

LEE E. PETERS
PETERS LAW FIRM
P.O. Box 2796
Las Cruces, NM 88004
Tel.: (575) 526-2101
lep@leepeterslaw.com

RODERICK E. WALSTON
BEST BEST & KRIEGER LLP
2201 North Main Street, Suite 390
Walnut Creek, CA 94596
Tel.: (925) 977-3304
roderick.walston@bbklaw.com

Attorneys for Elephant Butte Irrigation District

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ELEPHANT BUTTE IRRIGATION DISTRICT'S REPLY TO BRIEFS OPPOSING MOTION FOR LEAVE TO INTERVENE

INTRODUCTION

In their opposing briefs, New Mexico, Texas and the United States argue that non-state entities are categorically precluded from intervening in original actions in certain instances – if the entities were created by one of the states in the action, or if the action involves an interstate water dispute – and therefore Elephant Butte Irrigation District ("EBID") is categorically precluded from intervening here. The opposing parties also argue that EBID does not have a "compelling interest" in intervening apart from its interest in a "class" with other citizens and creatures of New Mexico, that EBID's interest is represented by either New Mexico or the United States, and therefore EBID does not have the right to intervene for this additional reason.

The opposing parties' first argument – that EBID is categorically precluded from intervening – is inconsistent with this Court's recent decision in *South Carolina v. North Carolina*, 558 U.S. 256 (2010), and earlier decisions, which have adopted a fact-specific standard rather than a categorical rule in determining whether a non-state entity has the right to intervene in an original action.

The opposing parties' second argument – that EBID does not have a "compelling interest" and that its interest is represented by New Mexico or the

United States – wrongly describes EBID's significant interest in this case. EBID is not, as portrayed by the opposing parties, a simple "water user" similarly situated to other water users in New Mexico and Texas, or a "fiscal agent" of the United States. Rather, EBID is responsible for administering the Rio Grande Project in New Mexico, and EBID's administration of the Project determines the amount of Rio Grande water reaching Texas. In administering the Project, EBID diverts Project water from the Rio Grande and delivers it to users in New Mexico, provides for Project return flows to the river that eventually reach Texas, otherwise monitors Project water to ensure that it reaches users in Texas and Mexico, and even physically delivers Project water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and does not serve as a functionary of the United States or carry out Project policies established by New Mexico. In addition, EBID is one of the signatories, along with the United States and a Texas water district, to the contracts that have apportioned Project water – and hence Rio Grande water itself – between New Mexico and Texas. In EBID's view, these contracts, and not the Rio Grande Compact, establish the apportionment of water between New Mexico and Texas. None of the parties in this litigation asserts a similar position, or otherwise represents EBID's interest.

Therefore, EBID has a "compelling interest" that is not represented by any party in this litigation, and is entitled to intervene.

I. ELEPHANT BUTTE IRRIGATION DISTRICT IS NOT CATEGORICALLY PRECLUDED FROM INTERVENING.

The opposing parties and EBID agree that EBID has the burden of demonstrating that it has the right to intervene in this original action. As this Court recently stated in *South Carolina*, a non-state entity seeking to intervene in an original action has "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010), quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam).[1]

The opposing parties and EBID disagree, however, on the nature of the burden that a non-state entity, such as EBID, must sustain. The opposing parties argue that the burden for certain non-state entities – particularly those, like EBID, that have been created by one of the states in the original action

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[1] The *South Carolina* Court described the above-quoted standard as the "general rule" for determining whether a non-state entity has the right to intervene in an original action. *South Carolina*, 558 U.S. at 266. EBID cited this "general rule" in its opening brief. EBID Br. 19. New Mexico asserts that EBID is arguing that the "general rule" "favor[s] intervention by nonstate parties." N.M. Br. 3. EBID made no such contention, and instead merely cited *South Carolina*'s statement that the "general rule" is as described above.

– is so high that they are categorically precluded, or virtually so, from intervening in original actions.

The opposing parties have mischaracterized the nature of the burden that EBID must sustain. This Court in *South Carolina* and other cases has rejected a categorical rule that precludes certain non-state entities from intervening in original actions, and has instead adopted a more flexible, fact-specific standard that considers whether the non-state entity has a "compelling" interest that is not represented by its state. As we explain, EBID meets this more flexible standard and should be allowed to intervene.

A. In *South Carolina* and Other Cases, This Court Has Adopted a Fact-Specific Standard Rather Than a Categorical Rule in Determining Whether a Non-State Entity Can Intervene in an Original Action.

In *South Carolina*, three non-state entities sought to intervene in an original action brought by South Carolina against North Carolina for equitable apportionment of the interstate Catawba River. The three non-state entities were (1) the Catawba River Water Supply Project (CRWSP), a water supply agency that provided water supplies to users in both states; (2) Duke Energy Carolina, LLC ("Duke Energy"), which operated dams and reservoirs in the river and provided electricity to users in both states; and (3) the City of Charlotte ("Charlotte"), which held water rights in the Catawba River and was the

largest user of river water in North Carolina. *South Carolina*, 558 U.S. at 261-262. The *South Carolina* dissenting opinion argued that all non-sovereign entities, including the three entities that sought intervention, should categorically be precluded from intervening in an original action for equitable apportionment of interstate waters, because "[a]n interest in water is an interest shared with other citizens, and is properly pressed or defended by the State." *South Carolina*, 558 U.S. at 279 (Roberts, C.J., dissenting).

The *South Carolina* majority opinion rejected the dissenting opinion's proposed categorical rule and instead adopted a fact-specific standard. The Court majority held that two of the non-state entities, CRWSP and Duke Energy, should be allowed to intervene because they were "bistate entities" that provided water supplies and electricity to users in both states, and thus these entities had "compelling interests" that could not be represented by either state. *South Carolina*, 558 U.S. at 268-273. The Court held that the third non-state entity, Charlotte, should not be allowed to intervene, because Charlotte was simply a water user – albeit the largest water user – of river water in North Carolina, and thus was similarly situated to all other water users in North Carolina; the "magnitude" of Charlotte's interest, the Court stated, "does not distinguish it in kind from other members of the class" of water users in North Carolina. *Id.* at 274-275. Thus, the Court rejected the dissenting opinion's categorical approach and instead examined the interest of each non-state entity to

determine whether it had a compelling interest not represented by the state.

In adopting its fact-specific standard, the *South Carolina* Court cited many factors cited by the opposing parties here – such as "[r]espect for state sovereignty" and the undesirability of allowing a state to be "judicially impeached" by its own subjects – in concluding that the standard for intervention by non-state entities in original actions is "high – and appropriately so." *South Carolina*, 558 U.S. at 267. The Court also stated, however, that the fact that the standard for intervention is "high . . . does not mean that it is insurmountable." *Id.* at 268.[2] In support of its conclusion that the standard is not "insurmountable," the Court cited several cases in which it had allowed non-state entities to intervene in original actions. *Id.* at 264-265, 268.[3] The Court concluded that "[i]t is . . . not a novel proposition to accord party status to a citizen in an original action between States," and the Court "has granted leave, under appropriate circumstances, for non-State entities to

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[2] All three parties opposing EBID's intervention mention the Court's statement that the standard for intervention is "high," Tex. Br. 4; N.M. Br. 3; U.S. Br. 9, but none mentions the Court's following statement that the standard is not "insurmountable."

[3] The cited cases were *Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981), *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922), *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam), and *Arizona v. California*, 460 U.S. 605, 613-614 (1983). *South Carolina*, 558 U.S. at 264-265, 268.

intervene as parties in original actions between States for nearly 90 years." *Id.* at 264. The Court stated that "our practice long has been to allow such intervention [by non-state entities] in compelling circumstances." *Id.* at 268. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981) ("[I]t is not unusual to permit intervention of private parties in original actions," citing *Oklahoma v. Texas*, 258 U.S. 574 (1922)).

Thus, *South Carolina* held that a non-state entity may intervene in an original action if it has a compelling interest not represented by the state, and rejected the dissenting view that a non-sovereign entity should categorically be precluded from intervening in an equitable apportionment action. *South Carolina* indicated that the factors cited by the opposing parties as the basis for their categorical argument – such as "respect of state sovereignty" and the undesirability of allowing non-state entities to "impeach" the home state's judgment – warrant placing a "burden" on the non-state entity to show that it meets the standard for intervention, but do not warrant categorical preclusion of the entity's right to intervene if it meets this standard. *South Carolina* thus adopted a flexible, fact-specific standard in determining the right to intervene, and rejected the categorical approach urged by the opposing parties here.

B. The Opposing Parties' Argument That EBID Is Categorically Precluded From Intervening Because It Was Created by the State of New Mexico Is Inconsistent With *South Carolina* and Other Supreme Court Decisions.

New Mexico and the United States argue that EBID is categorically precluded from intervening because it was created under the laws of New Mexico and therefore New Mexico represents EBID's interests in a *parens patriae* capacity. New Mexico argues that EBID is a "creature of the State of New Mexico" and that this Court has "consistently held that an entity created under state law such as EBID . . . does not meet the high standard of a compelling interest for intervention. . . ." N.M. Br. 6. If EBID is allowed to intervene, New Mexico argues, EBID will be able to "impeach its home state – something that this Court has said it cannot do." *Id.* at 22. The United States echoes New Mexico's argument, asserting that New Mexico represents EBID's interests because EBID is "a quasi-government entity created under New Mexico law," U.S. Br. 10, and that EBID's intervention would result in "precisely the type of 'impeach[ment] . . . by its own subjects' that is offensive to State sovereignty and inadequate to warrant intervention by a wholly intrastate entity." *Id.* at 11.

Contrary to New Mexico's and the United States' argument, this Court has allowed non-state entities created by one of the states in an original action to intervene in the action, if the entities demonstrate

that they have a "compelling interest" not represented by its state. Thus, the Court has rejected any suggestion that such entities are categorically precluded from intervening because they may "impeach" the home state's judgment. In *South Carolina* itself, this Court granted intervention to a non-state entity, CRWSP, that, as described by the Court, was a "municipal entity" created by the states. *South Carolina*, 558 U.S. at 269. Thus, *South Carolina* allowed a non-state entity to intervene even though it was created by the states.

Similarly, in *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam), this Court allowed the City of Port Arthur, Texas, to intervene in an original action in which the City's home state, Texas, was a party. Thus, *Louisiana* granted intervention to a non-state entity that was created by one of the states in the action.

In *Arizona v. California*, 460 U.S. 605 (1983), this Court allowed several Indian tribes to intervene in an original action for apportionment of the Colorado River even though the tribes' interests were represented by the United States, which had intervened in the action, thus indicating that a non-state entity may intervene in an original action even though its interest is represented by a sovereign party in the action. *Arizona*, 460 U.S. at 613-614.[4]

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[4] The United States argues that the Indian tribes were allowed to intervene in *Arizona* because they were "sovereign

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In *South Carolina*, this Court, citing its decisions in *Arizona v. California* and *Texas v. Louisiana*,

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entities," and that *Arizona* does not support EBID's intervention because EBID is not a "sovereign entity." U.S. Br. 13. The United States' interpretation of *Arizona* may be supported by the *South Carolina* dissenting opinion, which argued that "the Indian Tribes were allowed to intervene because they were sovereign entities." *South Carolina*, 558 U.S. at 283 (Roberts, C.J., dissenting). The *South Carolina* majority opinion, however, did not suggest that the Indian tribes in *Arizona* were allowed to intervene because they were sovereign entities, and did not mention the tribes' status as sovereign entities. Rather, the *South Carolina* majority opinion stated that the Indian tribes in *Arizona* were allowed to intervene "notwithstanding the Tribes' simultaneous representation by the United States," and that *Arizona* demonstrated that "the Court found compelling interests that warranted allowing nonstate entities to intervene in original actions in which the intervenors were nominally represented by sovereign parties." *South Carolina*, 558 U.S. at 268. The *South Carolina* majority opinion's analysis of *Arizona* is consistent with *Arizona* itself. *Arizona* did not suggest that the Indian tribes should be allowed to intervene because they were sovereign entities, and *Arizona* did not even mention the tribes' sovereign status. Instead, *Arizona* held that the Indian tribes' intervention would not violate the Eleventh Amendment – and thus they should be allowed to intervene – because (1) the "[w]ater rights claims for the Tribes were brought by the United States" and the Eleventh Amendment does not "prevent a State's being sued by the United States," (2) "[t]he Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States," and (3) the tribes are entitled "to take their place as independent qualified members of the body politic." *Arizona*, 460 U.S. at 614-615 (citation and internal quotation marks omitted). Thus, *Arizona* is not distinguishable, as claimed by the United States, because the Indian tribes were "sovereign entities."

stated that the Court in those cases "found compelling interests that warranted allowing nonstate entities to intervene in original actions in which the intervenors were nominally represented by sovereign entities." *South Carolina*, 558 U.S. at 268.

Indeed, this Court's standard for intervention by non-state entities in original actions, as described in *South Carolina* and *New Jersey*, authorizes intervention by a non-state entity if it has a "compelling interest" that is apart from its interest "in a class with all other citizens and creatures of the state." *South Carolina*, 558 U.S. at 267; *New Jersey v. New York*, 345 U.S. 369, 373 (1953). Thus, the Court's standard for intervention authorizes non-state entities to intervene even though they may be "creatures" as opposed to "other citizens" of the state, as long as they meet this Court's fact-specific standard for intervention.

In sum, this Court has held in several cases that a non-state entity may intervene in an original action even though the entity was created by one of the states in the action, if the entity demonstrates that it has a compelling interest not represented by its state. As a matter of logic and policy, a non-state entity that has a compelling interest not represented by its state should be allowed to intervene in an original action in which its state is a party; otherwise, the entity's interest, even though compelling, would not be represented. And, if the entity is allowed to intervene because the state does not represent its interest, the entity may properly assert all arguments necessary to

protect its interest, even though this may result in "impeachment" of the state's judgment; otherwise, there would be no point in the entity's intervention. Such is the logic and policy that supports this Court's flexible, fact-specific standard for intervention in *South Carolina* and other cases.

C. Texas' Argument That Non-Sovereign, Non-Bistate Entities Are Categorically Precluded From Intervening in Original Interstate Water Disputes Is Misplaced.

Texas, citing the *South Carolina* dissenting opinion, argues that this Court has "a long history of 'rejecting attempts by nonsovereign entities' to intervene in interstate water disputes." Tex. Br. 5. Texas claims that this Court has granted intervention in an "interstate water dispute" to a party other than the United States or an Indian tribe in only one case, *i.e.*, *South Carolina* itself, where the Court granted intervention to entities that had "direct bistate interests." *Id.* at 5-7. Texas concludes that since EBID is not a bistate entity, it does not have the right to intervene. *Id.* at 7-10.[5] In effect, Texas argues that non-sovereign, non-bistate entities, including EBID, are

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[5] As explained later, EBID has bistate interests and not solely intrastate interests because, in administering the Rio Grande Project, EBID monitors Project water to ensure that the water reaches users in Texas and Mexico, and EBID physically delivers Project water to users in Texas. *See* pages 21-22, *supra*.

categorically precluded, or virtually so, from intervening in original interstate water disputes.[6]

Contrary to Texas' argument, this Court in *South Carolina* did not suggest that a different standard for intervention applies in interstate water disputes than other kinds of interstate disputes. Rather, *South Carolina* applied the same standard for intervention in the interstate water dispute in that case that it applies in other cases, namely whether the non-state entity has a compelling interest not represented by its state. Also, *South Carolina* did not suggest that only a non-state entity that has bistate interests can intervene in an interstate water dispute. Rather, *South Carolina* held that the non-state entities in that case, CRWSP and Duke Energy, had "compelling interests" and were allowed to intervene because their interests were bistate. In other words, all bistate interests may be compelling, but all compelling interests are not necessarily bistate. A bistate

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[6] New Mexico makes a similar argument, citing this Court's decisions in *Nebraska v. Wyoming*, 515 U.S. 1, 22-23 (1995), *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), and *Tarrant Reg'l Water Dist. v. Hermann*, ___ U.S. ___, 133 S.Ct. 2120, 2132-2133 (2013), in arguing that the states speak for their citizens in interstate water disputes involving equitable apportionment claims or compact claims, and that such disputes involve matters "rooted in state sovereignty." N.M. Br. 4. This Court in *South Carolina*, however, authorized intervention by two non-state entities in an equitable apportionment action notwithstanding the Court's "[r]espect for state sovereignty" because the entities satisfied the Court's fact-specific "compelling interest" standard. *South Carolina*, 558 U.S. at 267, 268-273.

interest is one way – but not the only way – for a non-state entity to satisfy the "compelling interest" standard.

The *South Carolina* dissenting opinion cited by Texas argued that non-state entities should categorically be precluded from intervening in original actions for equitable apportionment of interstate waters, because a non-state entity's share of the interstate waters is subsumed within the state's equitably apportioned share, and the state represents the interests of all of its citizens as *parens patriae* in determining the state's equitably apportioned share. *South Carolina*, 558 U.S. at 279-280 (Roberts, C.J., dissenting), citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938).[7] Apart from the fact that the *South Carolina* majority rejected the dissenting argument, Texas' action here does not seek an equitable apportionment of interstate waters. Instead, Texas alleges that the Rio Grande Compact apportioned Rio Grande waters between New Mexico and Texas based on conditions prevailing in 1938, and Texas seeks to enforce its alleged rights under the Compact. Thus, this action presents an issue of compact interpretation, not

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[7] Under the equitable apportionment doctrine, which is a federal common law doctrine fashioned by this Court, this Court considers "all relevant factors" in arriving at a "just and equitable apportionment" of an interstate stream. *South Carolina*, 558 U.S. at 271-272; *see Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *Nebraska v. Wyoming*, 325 U.S. 589, 599, 616-620 (1945); *Wyoming v. Colorado*, 259 U.S. 419, 458-460 (1922).

equitable apportionment. The *South Carolina* dissenting opinion – which was rejected by the Court majority – does not support Texas' argument because this is not an equitable apportionment action.[8]

II. ELEPHANT BUTTE IRRIGATION DISTRICT HAS A "COMPELLING INTEREST" APART FROM ITS INTEREST IN A "CLASS" WITH "ALL OTHER CITIZENS AND CREATURES" OF NEW MEXICO.

The parties opposing EBID's intervention argue that EBID is a "water user" similarly situated to other water users in New Mexico and Texas, and thus

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[8] As explained later, although Texas' complaint alleges that the Rio Grande Compact apportioned Rio Grande water between Texas and New Mexico and that EBID was not a party to the Compact, EBID was a party to the contracts that EBID argues apportioned the water between the two states, and the contracts are relevant in explaining why the Compact did not apportion the water; thus, EBID has a compelling interest in intervening even though it was not a party to the Compact. *See* pages 24-30, *infra*. New Mexico argues that a non-state entity has a lesser right to intervene in an interstate compact dispute, as here, than an equitable apportionment action, because an interstate compact dispute involves an interpretation of a compact signed by the state, and the state is the only proper entity to interpret the compact. N.M. Br. 20-21. Regardless of whether, in the abstract, a non-state entity generally has a lesser right to intervene in an interstate compact dispute, EBID has a compelling interest in intervening here because EBID is a party to the contracts that apportioned Rio Grande Project water between the two states and the contracts are relevant in explaining why the Compact did not apportion the water. *See* pages 24-30, *infra*.

EBID does not have a "compelling" or "unique" interest in intervening. Tex. Br. 8-9; N.M. Br. 13-14, 17-18; U.S. Br. 12. They argue that since EBID is a water user, EBID's interest is like that of the Cities of Philadelphia and Charlotte in *New Jersey* and *South Carolina*, which were denied intervention because they were similarly situated to other entities that had water rights in the interstate rivers. N.M. Br. 8-9; U.S. Br. 10. The opposing parties argue that EBID's intervention would potentially open the door to intervention by other water users in New Mexico and Texas, N.M. Br. 13; U.S. Br. 14, and thus the Court would become involved in an "intramural dispute" among water users in the two states. N.M. Br. 23; U.S. Br. 12; Tex. Br. 10. The United States argues that EBID is a mere "fiscal agent" of the United States in its operation of the Rio Grande Project, and that EBID's operational responsibilities do not provide a basis for intervention. U.S. Br. 6. The opposing parties conclude that EBID does not have a "compelling interest" apart from its interest in a "class" with similarly-situated water users, and therefore does not have the right to intervene.

Contrary to the opposing parties' arguments, EBID is not a "water user" similarly situated to other water users in New Mexico and Texas. In fact, EBID does not "use" water at all. Rather, EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project's distribution and drainage facilities in New Mexico. In that capacity, EBID delivers Project water for irrigation use in New

Mexico, provides for Project return flows to the Rio Grande, monitors Project water to ensure that it reaches users in Texas and Mexico, and even physically delivers Project water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and is not a functionary of the United States in administering the Project. Further, EBID has entered into contracts with the United States and a Texas water district that have apportioned Project water between New Mexico and Texas, and EBID exercised its independent authority and judgment in entering into the contracts and establishing the apportionment. Because of its unique responsibilities in administering the Project and signing the contracts that have apportioned the water, EBID has a "compelling interest" in intervention apart from its interest in a "class" of "all other citizens and creatures of the state." *South Carolina*, 558 U.S. at 267. Indeed, because of its unique responsibilities, there is no "class" in New Mexico to which any other entity like EBID belongs. EBID is unlike the Cities of Philadelphia and Charlotte in *New Jersey* and *South Carolina*, which were denied intervention because they belonged to a "class" of similarly-situated water users whose interests were represented by their states.

A. EBID Has a "Compelling Interest" Because It Administers the Rio Grande Project in New Mexico, and Exercises Its Independent Authority and Judgment in Administering the Project.

Although EBID described its unique responsibilities in administering the Rio Grande Project in its opening brief, EBID Br. 3-4, 6-7, 11-13, the parties opposing EBID's intervention – although asserting that EBID is a "water user," *e.g.*, Tex. Br. 8-9; N.M. Br. 13-14 – did not mention EBID's unique responsibilities in administering the Project, or otherwise argue that EBID's unique responsibilities are an insufficient basis for intervention.

As explained in EBID's opening brief, EBID was created pursuant to a New Mexico statute for the purpose of "cooperat[ing]" with the United States in administering the federal Rio Grande Project in New Mexico "under the federal reclamation law, or other federal laws." N.M. Stat. §§ 73-10-1 *et seq.*; EBID Br. 3.[9] Thus, EBID is required to apply federal law,

[9] Under the New Mexico statute, EBID is authorized to "cooperat[e]" with the United States in providing for irrigation of lands "under the federal reclamation law, or other federal laws," N.M. Stat. § 73-10-1; to enter into "all necessary contracts" to establish rules and regulations for "the distribution and use of water" on the lands, *id.* at § 73-10-16; to "unite" with an irrigation district of an adjoining state to establish "a system of irrigation and drainage works" for irrigation of land, *id.* at § 73-10-23; and to enter into a "contract" with the United States for the purpose of "cooperation" with the United States "under the federal reclamation law or other federal laws," *id.* at § 73-11-53.

including the federal reclamation laws, in carrying out its functions. In 1979, EBID entered into a Take-over Contract with the United States and the Texas water district that administers the Project in Texas, the El Paso County Water Improvement District No. 1 (EPCWID). EBID Br. 12-13. Under the Takeover Contract, the United States transferred to EBID the responsibility for operating and maintaining the Project's entire distribution and drainage system in New Mexico. App. 1.[10] As a result of the transfer, many federal employees who had operated the Project on behalf of the United States were transferred to EBID, where they continued performing the same functions as EBID employees. App. 2-3. Under a 1989 contract between the United States, EBID and EPCWID, the United States transferred to EBID the responsibility for operating and maintaining the three diversion dams in New Mexico – the Percha, Leasburg and Mesilla Dams – that divert Project water into EBID-operated canals and laterals for irrigation use in New Mexico. App. 3. After EBID repaid New Mexico's share of the Project construction costs, Congress in 1992 authorized the Secretary of the Interior to transfer to EBID the title to Project facilities in New Mexico, including the canals and drainage systems. Pub. L. 102-575, 106 Stat. 4705

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[10] The Project functions described in this portion of this brief are based on the declaration of EBID's General Manager, Gehrig Lee Esslinger, which is attached as Appendix 1 to this brief.

(1992); EBID Br. 13. In 1996, the Secretary of the Interior issued deeds that transferred title to these facilities to EBID. App. 4; EBID Br. 13. Thus, EBID – not the United States – owns and operates the Project distribution and drainage facilities in New Mexico.

As a result of these statutes, contracts and deeds, the Rio Grande Project is administered in New Mexico as follows: The United States owns and operates the Elephant Butte and Caballo dams and reservoirs that store Project water, and the United States and the two water districts, EBID and EPCWID, jointly determine the amount of stored water available to the districts. App. 5. The water districts themselves, however, determine when and how much water is released from storage for the districts; the districts provide this notification to the federal Project operators, and the federal operators release the water as requested by the districts. App. 5, 7. The water, once released, flows downstream until it reaches the three diversion dams in New Mexico, the Percha, Leasburg and Mesilla Dams. App. 5. EBID operates the three diversion dams, and determines when and how much water is diverted from the dams. App. 3, 5. The water, once diverted by EBID at the diversion dams, flows through EBID canals and laterals to farmers in New Mexico, who use the water for irrigation; EBID owns and operates the canals and laterals, and makes all decisions concerning timing and amount of water deliveries through these facilities. App. 5. A portion of the water not used for irrigation is captured by drainage facilities and returned to the Rio Grande for

further downstream use; EBID owns and operates the drainage facilities that provide for the return flows to the river. App. 6.

EBID also plays a role in ensuring the delivery of Project water to users in Texas and Mexico. EBID operates the three diversion dams in New Mexico not only to provide water for irrigation use in New Mexico, but also to ensure delivery of Project water to downstream users in Texas and New Mexico, based on delivery orders from districts in Texas and Mexico. App. 3, 4. For example, when EPCWID orders a specific quantity of Project water for use in Texas, the United States releases the water from the upstream reservoirs and EBID monitors the water as it flows downstream through the EBID-operated diversion dams, to ensure that the designated quantity of water reaches EPCWID's facilities in Texas. App. 3.

The most downstream of the three diversion dams that EBID operates, the Mesilla Dam, diverts Project water for use in both New Mexico and Texas. App. 6. When EPCWID orders a specific quantity of Project water for use in Texas and the United States releases the water from the upstream reservoirs, EBID monitors the water as it flows downstream past the first two diversion dams, and EBID may then divert the water at the Mesilla Dam in order to transport it through EBID canals to EPCWID's system for use in Texas. App. 3, 7-8. Thus, EBID diverts Project water at the Mesilla Dam for users in both New Mexico and Texas.

Indeed, EBID itself physically delivers a portion of Project water to users in Texas. Under a 1995 contract with EPCWID, EBID delivers Project water to Texas farmers in two units of the EPCWID system – Units 6B and 6C – that cannot be reached by EPCWID facilities; under the contract, EBID delivers water to 2,400 acres in Unit 6B and 1,400 acres in Unit 6C, for a total of 3,400 acres. App. 6-7. In delivering the water, EBID employees drive in EBID vehicles across the New Mexico-Texas state line into Texas, and operate turnouts in Texas that deliver the water to these EPCWID units. App. 7. Thus, EBID physically delivers Project water to users in both New Mexico and Texas.

Since EBID administers the Project to ensure water deliveries not only to New Mexico but also to Texas and Mexico, and physically delivers Project water to users in Texas, EBID serves bistate interests and not solely intrastate interests in administering the Project. The opposing parties' assertion that EBID does not serve bistate interests and does not deliver Project water to lands outside New Mexico, N.M. Br. 6, 11-12; Tex. Br. 9; U.S. Br. 11-12, is incorrect. In *South Carolina,* the Supreme Court granted intervention to two non-state entities, CRSWP and Duke Energy, because they served bistate interests. *South Carolina,* 558 U.S. at 268-273. Since EBID serves bistate interests, *South Carolina* supports EBID's right to intervene.

In sum, EBID administers the Rio Grande Project in New Mexico, provides for water deliveries in

New Mexico, provides for return flows to the Rio Grande, monitors the river flows to ensure water deliveries in Texas and Mexico, and physically delivers water to users in Texas. In administering these functions, EBID exercises its independent authority and judgment, and is not subject to regulatory oversight or review by the United States. The United States' assertions that EBID is simply a "fiscal agent" of the United States, U.S. Br. 6, and merely "assists" the United States in administering the Project, U.S. Br. 9, is incorrect.[11] The United States was granted intervention – even though it was not a party to the Rio Grande Compact that forms the basis of Texas' complaint – because of its role in administering the Rio Grande Project. Since EBID administers the Rio Grande Project in New Mexico, the rationale for granting the United States' intervention supports EBID's right to intervene.

In its complaint, Texas alleges that New Mexico is violating Texas' rights under the Rio Grande Compact by allowing Rio Grande water that has been apportioned to Texas under the Compact to be "intercepted and used" in New Mexico. Tex. Compl. ¶ 4. EBID administers the Project facilities that divert Rio Grande water for use in New Mexico and provide

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[11] The United States' assertion that the United States "determines" how much water is allocated between EBID and EPCWID, U.S. Br. 10, 13, is also incorrect, to the extent it implies that the United States makes these decisions unilaterally rather than jointly with EBID and EPCWID.

for return flows to the river, and these are the facilities that, under Texas' theory, cause Rio Grande water apportioned to Texas to be "intercepted and used" in New Mexico. Since EBID operates the Project facilities that cause the alleged interception of which Texas complains, EBID has a compelling and unique interest in intervening.

B. EBID Has a "Compelling Interest" Because It Is a Party to the Contracts That Apportion, and Have Historically Apportioned, Rio Grande Water Between New Mexico and Texas.

Apart from its administration of the Rio Grande Project, EBID also has a compelling interest in intervening because it is a party to the contracts that apportion, and have historically apportioned, Project water – and hence Rio Grande water itself – between New Mexico and Texas.

As EBID argued in its opening brief, the Compact did not apportion Rio Grande water between New Mexico and Texas. EBID Br. 30-32. The Compact required that Colorado deliver Rio Grande water to New Mexico and that New Mexico deliver water to the Rio Grande Project, but did not require that New Mexico deliver water to Texas at the New Mexico-Texas state line. *Id.* at 11-12. Thus, the Compact apportioned Rio Grande water between Colorado and New Mexico and between New Mexico and the Project, but did not apportion Project water itself between

New Mexico and Texas. *Id.* at 30-32. The apparent reason that the Compact did not apportion the water between New Mexico and Texas is because the Compact negotiators were aware that the United States, EBID and EPCWID had already signed the 1938 contract apportioning Project water between New Mexico and Texas. *Id.* at 33. Since the three entities had signed a contract apportioning the water, there was no need for the Compact to address the subject. The Rio Grande Compact is thus different from many other interstate compacts apportioning interstate waters, which apportion all such waters between the signatory states.

Under the 1938 contract signed by the United States, EBID and EPCWID, each acre of the Project receives the same amount of Project water as any other acre. EBID Br. 11-12. Since 57% of the Project lands are in New Mexico and 43% are in Texas, the apportionment of Project water between the two states is based on the same ratio. *Id.* In 2008, the United States, EBID and EPCWID entered into the Operating Agreement that adjusted the rights in the 1938 contract by, first, providing for annual carryover storage and, second, changing the baseline for groundwater pumping in New Mexico from 1938, when the contract was signed, to the drought years of 1951-1978. EBID Br. 16-17. Thus, the 1938 contract apportioned Project water between New Mexico and Texas, and the 2008 Operating Agreement modified the apportionment based on current conditions.

The apportionment of Project water established in the contracts has historically determined the apportionment of Rio Grande Project water itself between New Mexico and Texas, because the amount of Project water reaching Texas is the same as the amount of Rio Grande water reaching Texas. That is, the amount of Rio Grande water reaching Texas is the amount of Project water released from the upstream reservoirs, less river losses and Project water diverted for use in New Mexico and not returned to the river. Since the apportionment of Rio Grande water has been determined by the apportionment of Project water established in the contracts to which EBID is a signatory, EBID has a compelling interest in intervening in any action involving an apportionment of Rio Grande water between New Mexico and Texas.

Indeed, Texas acknowledges that the apportionment of Rio Grande water is based, at least in part, on contracts to which EBID is a signatory. In its motion to file its complaint, Texas asserted that the apportionment of Rio Grande water established by the Rio Grande Compact "incorporates the basic assumption of the authorization, construction and operation of the Rio Grande Project by the United States," Tex. Br. in Support of Mot. for Leave to File Compl., at 10, and that "water is allocated and belongs to Rio Grande Project beneficiaries . . . based upon allocations derived from the Rio Grande Project authorization and *relevant contractual arrangements*."

Id. at 2-3 (emphasis added).[12] Since Texas' claimed apportionment of water under the Compact is based, at least in part, on "relevant contractual arrangements" to which EBID is a party, EBID has a compelling interest in intervening under Texas' theory of the case.

EBID's interest in intervening is more compelling than that of the two bistate entities, CRWSP and Duke Energy, that were allowed to intervene in *South Carolina*. In *South Carolina*, the bistate entities were allowed to intervene because they had bistate interests not represented by their states, not because their intervention was necessary to determine the apportionment of the interstate river. In the instant case, by contrast, EBID's activities, both in administering the Project and signing the contracts that apportioned the water, may significantly affect if not determine the outcome of the litigation, particularly if the Court determines, as EBID argues, that the contracts and not the Compact apportion the water.

Although the historical apportionment of Rio Grande water has been established by the contracts signed by the United States, EBID and EPCWID, none of the parties in this action argues that the apportionment of water was established by the

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[12] Similarly, Texas stated in its opposition to EBID's intervention motion that under its theory "[w]ater would be stored, released, and delivered to Texas subject to Reclamation's contracts in New Mexico, *i.e.*, EBID's contract, and the United State's [sic] treaty obligation to Mexico." Tex. Br. 14.

contracts rather than the Compact. EBID, if allowed to intervene, would be the only party making this argument. This demonstrates, again, that EBID has a compelling interest not represented by any of the parties.

C. The Fact That EBID Was Not a Party to the Rio Grande Compact Is Not Relevant Concerning EBID's Right to Intervene.

The opposing parties contend that EBID's administration of the Rio Grande Project is irrelevant, because this case involves an interpretation of the Rio Grande Compact and EBID was not a party to the Compact and has no rights or obligations under the Compact. N.M. Br. 12-13, 15-17; Tex. Br. 8-9; U.S. Br. 9-10; *see* note 8, *supra*. However, the contracts signed by the United States, EBID and EPCWID for apportionment of Project water between New Mexico and Texas are relevant to the question whether the Compact apportioned the water between the states, and, since EBID is a party to the contracts, it has a compelling interest in intervening even though it was not a party to the Compact.

As explained above, the Rio Grande Compact did not apportion Rio Grande water between New Mexico and Texas, because the United States, EBID and EPCWID had already entered into the 1938 contract that apportioned Project water between the two states; the Compact did not address the apportionment issue

because the 1938 contract had already addressed the issue. *See* pages 24-25, *supra*. The goal of the Compact negotiators was to ensure that a certain quantity of Rio Grande water reach the Project, not to ensure that a certain quantity of water reach Texas, a subject that had already been addressed in the contract. *Id.* If the Compact had apportioned Rio Grande water between the states, as Texas contends, the Compact apportionment would have superseded the apportionment established in the contracts, because the Compact was approved by Congress and hence is federal law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Historically, however, the apportionment established in the contracts have been followed by the United States and the two water districts in administering the Rio Grande Project, and by users in New Mexico and Texas who have received deliveries of Project water. This further demonstrates that the contracts and not the Compact apportioned the water between the two states.

Thus, the contracts signed by the United States, EBID and EPCWID that apportioned the water are relevant in explaining why the Compact itself did not apportion the water, and EBID, as a signatory to the contracts, has a compelling interest in intervening even though it was not a party to the Compact. EBID's intervention would assist the Court in understanding the relationship between the Compact and the contracts, which provides a further basis for EBID's intervention. *See Maryland v. Louisiana,* 451 U.S. 725, 745 n. 1 (1981) (authorizing intervention in

original action by pipeline companies that were liable for payment of Louisiana's tax "in the interest of a full exposition of the issues").

D. EBID's Intervention Would Not Potentially Allow Intervention by Numerous Water Users in New Mexico and Texas.

Since EBID has a unique interest in this case – in administering the Rio Grande Project in New Mexico and participating in the contracting process that established the historical apportionment of water – EBID is unlike the numerous "water users" in New Mexico and Texas that the opposing parties claim are similarly situated to EBID and would potentially be allowed to intervene if EBID is granted intervention. Tex. Br. 8-9; N.M. Br. 13-14; U.S. Br. 12. Thus, EBID's intervention would not pave the way for intervention by numerous water districts and users in the two states. The only entity that might have an interest comparable to EBID's interest, and that might be allowed to intervene if EBID intervenes, is EPCWID, which administers the Rio Grande Project in Texas and is a signatory to the 2008 Operating Agreement. To date, however, EPCWID has not sought intervention. Even if EPCWID seeks and obtains intervention, there are no other comparable entities in Texas or New Mexico that might be allowed to intervene on the basis of EBID's and EPCWID's intervention.

III. ELEPHANT BUTTE IRRIGATION DISTRICT'S INTEREST IS NOT REPRESENTED BY ANY PARTY.

The opposing parties argue that EBID's interest is represented by New Mexico. N.M. Br. 19-23; Tex. Br. 10-14; U.S. Br. 10-11. New Mexico contends that since EBID was "created" under New Mexico law, EBID "[i]n carrying out its statutory mission . . . carries out an interest of the State of New Mexico," and thus the interests of EBID and New Mexico are "aligned." N.M. Br. 22. The United States and Texas contend that – to the extent that New Mexico may not represent EBID's interest – EBID's interest is represented by the United States, which is responsible for administering the Rio Grande Project and ensuring its integrity and feasibility. U.S. Br. 13; Tex. Br. 10-14. None of the parties contends that EBID's interest is represented by Texas or Colorado.

Contrary to the opposing parties' arguments, neither New Mexico nor the United States represents EBID's interest.

A. New Mexico Does Not Represent EBID's Interest.

Although EBID was created under New Mexico law, New Mexico does not represent EBID's interest. EBID administers the Rio Grande Project in New Mexico, which controls the flow of Rio Grande water to Texas. Under its enabling act, EBID is required to cooperate with the United States in carrying out

Project functions "under the federal reclamation law, or other federal laws." N.M. Stat. § 73-10-1. Thus, EBID is required to fulfill the functions of a federal project created by Congress, and to comply with federal law in doing so. EBID is a hybrid entity, because it was created under state law but is mandated to fulfill the purposes of a federal project under federal law.

New Mexico, on the other hand, does not have any statutory authority or responsibility relating to administration of the Rio Grande Project in New Mexico, and does not exercise any authority or control over EBID in its administration of the Project. On the contrary, New Mexico disclaims any authority or responsibility for administration of the Project, or for ensuring that Project water reaches Texas. In opposing Texas' motion to file its complaint, New Mexico contended that its only obligation is to deliver Rio Grande water to the Project, and that, once the water is delivered to the Project, New Mexico has no further obligation to deliver or ensure the delivery of Project water to Texas, or to avoid "depletions" of the water before it reaches Texas.[13] Since New Mexico disclaims

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[13] In opposing Texas' motion for leave to file its complaint, New Mexico asserted that the Compact does not require New Mexico "to deliver water to Texas below Elephant Butte Reservoir," N.M. Br. in Opp. to Tex. Mot. for Leave to File Compl. 14; "does not create an obligation of the State of New Mexico to deliver water to the State of Texas," *id.* at 13; and "does not require New Mexico to avoid additional depletions below Elephant Butte Reservoir," *id.* at 20.

any authority or responsibility to administer the Project or ensure that Project water reaches Texas, New Mexico does not represent the interest of EBID, which is responsible for administering the Project and ensuring that Project water reaches Texas.

New Mexico thus takes divergent positions concerning its authority and responsibility for the Project's administration in its oppositions to Texas' motion to file its complaint and EBID's motion to intervene. In opposing Texas' motion to file its complaint, New Mexico disclaimed any responsibility concerning administration of the Project in New Mexico, or to ensure that Project water reaches Texas. *See* note 13, *supra*. In opposing EBID's motion to intervene, however, New Mexico claims to represent the interest of EBID, which is required to administer the Project and ensure that Project water reaches Texas. New Mexico's divergent positions concerning its authority and responsibility for the Project's administration undermines its claim that it represents EBID's interest.

Additionally, EBID was a party to the 1938 contract that apportioned Rio Grande water and the 2008 Operating Agreement that modified the apportionment, and New Mexico was not a party to either of these agreements. EBID exercised its independent authority and judgment in signing the agreements, and New Mexico did not exercise any authority or control over EBID in its decision to sign the agreements. Thus, while EBID participated in the contracting process that apportioned water between New

Mexico and Texas, New Mexico did not participate in this process.

Also, EBID and New Mexico take divergent positions on the validity of the 2008 Operating Agreement, which modified the 1938 contract that apportioned Rio Grande Project water between New Mexico and Texas. EBID, which signed the 2008 Operating Agreement, believes that the agreement provides a fair and equitable apportionment of Project water based on current conditions, and is valid. New Mexico, which did not sign the agreement, believes that the agreement is not valid, and has brought an action, currently pending, to overturn the agreement. *State of New Mexico v. United States, et al.*, No. 11-cv-691-JOB-WDS (D. N.M. Dec. 20, 2011); EBID Br. 25. Obviously New Mexico does not represent EBID's interest concerning whether the Operating Agreement provides a fair and equitable apportionment of Project water between the states.

EBID and New Mexico also take divergent positions on whether Project return flows resulting from drainage and seepage belong to the Project or instead are public waters subject to appropriation under New Mexico law. EBID believes that the return flows belong to the Project because they are generated by the Project and historically have been re-diverted and used by the Project, but New Mexico apparently believes that the return flows are public waters subject to appropriation under New Mexico law. EBID Br. 26. EBID also believes that the allocation of Project waters is governed by federal law, and New

Mexico believes that the allocation is governed by New Mexico law. *Id.*[14]

For these reasons, New Mexico does not represent EBID's interest.

B. The United States Does Not Represent EBID's Interest.

The United States does not represent EBID's interest. EBID administers the Rio Grande Project in New Mexico, and owns and operates the Project distribution and drainage facilities in New Mexico. The United States does not exercise authority or control over EBID in its administration of these functions. EBID – after determining when and how much water is released from storage for use in New Mexico – operates the diversion dams that divert water from the river in New Mexico, owns and operates the canals and laterals that deliver the water to farmers, owns and operates the drainage facilities

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[14] EBID argued in its motion that since EBID asserts different arguments than the parties, EBID's intervention "would help the Court to better understand the complicated issues raised in this case." EBID Br. 29. The opposing parties argue that this is an inadequate ground for intervention. U.S. Br. 15; N.M. Br. 21. This Court in *Maryland v. Louisiana*, 451 U.S. 725, 745 n. 1 (1981), however, granted intervention to pipeline companies that were liable for paying the disputed Louisiana tax "in the interest of full exposition of the issues." Since EBID's intervention would contribute to a "full exposition of the issues," this factor, among others, supports EBID's right to intervene.

that provide for return flows to the river, monitors Project water to ensure that it reaches users in Texas and Mexico, and physically delivers water to users in Texas. *See* pages 20-22, *supra*; EBID Br. 5-6, 12-13. In performing these functions, EBID exercises its independent authority and judgment, and the United States does not exercise authority or control over EBID. Although the Rio Grande Project was authorized by Congress, Congress authorized the Secretary of the Interior to transfer the Project facilities to EBID after EBID repaid New Mexico's share of the Project costs, and the Secretary, acting pursuant to this congressional authorization, transferred title to the Project facilities to EBID, including the canals and drainage systems. *See* pages 19-20, *supra*; EBID Br. 12-13. These Project facilities are owned and operated by EBID, and the United States has no authority or control over EBID in its operation of the facilities. Although the United States is responsible for ensuring the Project's integrity and feasibility, EBID owns and operates the Project distribution and drainage facilities in New Mexico and thus is also responsible for ensuring the Project's integrity and feasibility. The responsibility to protect the Project's integrity and feasibility in New Mexico belongs to both the United States and EBID, and not solely to the United States.

Additionally, the United States, EBID and EPCWID signed the 1938 apportionment contract that apportioned Project water between New Mexico and Texas, and these entities also signed the 2008

Operating Agreement that modified the 1938 contract. *See* pages 24-25, *supra*; EBID Br. 11-12, 16-17. Thus, the United States, EBID and EPCWID have jointly established the apportionment of Project water through the contracting process, and the apportionment was not established by the United States unilaterally. In signing these agreements, EBID exercised its independent authority and judgment, and the United States did not exercise authority or control over EBID.

Further, the United States and EBID take divergent positions on significant issues in this case. The United States apparently supports Texas' claim that the Rio Grande Compact apportioned Rio Grande water between Texas and New Mexico based on 1938 conditions. EBID, on the other hand, believes that the Compact did not apportion the water, and that the apportionment was instead established by the 1938 contract as modified by the 2008 Operating Agreement. EBID Br. 30-35. Also, the United States and EBID disagree on whether the "hydrologically connected groundwater" of the Rio Grande basin belongs to the Project or instead is public water subject to appropriation under New Mexico law. The United States contends that the hydrologically connected groundwater belongs to the Project, and EBID contends that any Project water that percolates into the ground and becomes part of the aquifer does not belong to the Project and instead is public water

subject to appropriation under New Mexico law. EBID Br. 37-38.[15]

For these reasons, the United States does not represent EBID's interest.

IV. ELEPHANT BUTTE IRRIGATION DISTRICT SHOULD NOT BE DENIED INTERVENTION BECAUSE IT DID NOT INCLUDE A COMPLAINT OR ANSWER IN ITS MOTION FOR LEAVE TO INTERVENE.

Texas argues that EBID's motion to intervene suffers from "fatal procedural defects" because EBID's motion does not include a "pleading," in the form of a complaint or answer in intervention. Tex. Br. 3-4. Supreme Court Rule 17.2 provides that the form of pleadings and motions in original actions follows the

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[15] The United States argues that EBID can present its arguments as an amicus, which weighs against its right to intervene. U.S. Br. 14-15. This Court has held, however, that a non-state entity that has a compelling interest not represented by its state may intervene in an original action in which the state is a party. *South Carolina*, 558 U.S. 267. Thus, a non-state entity that meets this standard is entitled to intervene irrespective of whether it might otherwise present its views as an amicus. If EBID is allowed to intervene, EBID would be able to participate as a party – and thus to produce evidence and witnesses, cross-examine witnesses, and file or oppose exceptions from the Special Master's recommendations – in support of its legal position, which is not represented by any of the parties. Thus, EBID's compelling and unique interest cannot be protected simply by allowing EBID to participate as an amicus.

Federal Rules of Civil Procedure (FRCP), and Rule 24(c) of the FRCP provides that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

This Court has held that Rule 17.2 provides only that the FRCP is taken as a "guide" in original actions. *South Carolina*, 558 U.S. at 276 n. 8; *Arizona v. California*, 460 U.S. 605, 614 (1983). Therefore, Rule 17.2 does not require strict compliance with FRCP Rule 24(c), including its requirement that a motion to intervene must include a "pleading."

Section 24(c) itself requires only that the motion to intervene apprise the court and parties of the intervenor's claims, and does not strictly require that a complaint or answer be included as part of the motion to intervene. *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943); *Spring Const. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership v. Nelson*, 708 F.Supp. 1268, 1272 (S.D. Fla. 1989); *United States v. Wagner*, 2011 U.S. Dist. Lexis 63598, at **22-23 (D. Colo. 2011). The Ninth Circuit has stated that the petition to intervene must "fully state[ ] the legal and factual grounds for intervention," and an intervention motion without a pleading is sufficient if "the court [is] otherwise apprised of the grounds for the motion." *Beckman*, 966 F.2d at 474. The Fourth Circuit has stated that in determining whether an intervention motion is invalid under Rule 24(c) if it fails to include a "pleading," "the proper

approach is to disregard non-prejudicial technical effects," and a motion to intervene is valid if it "set[s] forth sufficient facts and allegations" to "apprise" the parties of the intervenor's claims. *Spring Const.*, 614 F.2d at 377, citing 7A Wright & Miller, Federal Practice and Procedure § 1914 (Supp. 1978).

Here, EBID's motion to intervene and supporting brief constitute a "pleading" within the meaning of Rule 24(c), and in any event the motion and brief fully apprised the Court and the parties of EBID's claims and arguments. The parties' briefs opposing EBID's intervention indicate that they fully understand EBID's claims and arguments, and none has indicated any uncertainty concerning EBID's claims and arguments. Thus, none has been prejudiced because EBID did not file a complaint or answer. EBID's motion to intervene thus complies with Rule 24(c), and hence with Supreme Court Rule 17.2.

Even assuming *arguendo* that EBID's motion does not comply with Rule 24(c) and thus with Rule 17.2, the remedy for noncompliance with Rule 24(c) is to require the intervenor to file the necessary pleading and not to deny intervention. *Spring Const.*, 614 F.2d at 377 (holding that failure to file pleading under Rule 24(c) can be "rectified" by later filing of pleading); *WJA Realty*, 708 F.Supp. at 1272 (same). Thus, if the Court decides that EBID's motion to intervene is defective because it did not include a complaint or answer, the Court should require EBID to file a complaint or answer as a condition for its right to

intervene, and EBID will file the appropriate document.

CONCLUSION

For the foregoing reasons, Elephant Butte Irrigation District's motion for leave to intervene should be granted.

Respectfully submitted,

RODERICK E. WALSTON
BEST BEST & KRIEGER LLP
2201 North Main Street, Suite 390
Walnut Creek, CA 94596
Tel.: (925) 977-3304
roderick.walston@bbklaw.com

STEVEN L. HERNANDEZ
(*Counsel of Record*)
LISA J. HENNE
LAW OFFICE OF
STEVEN L. HERNANDEZ
P.O. Box 13108
Las Cruces, NM 88013
Tel.: (575) 526-2101
slh@lclaw-nm.com

LEE E. PETERS
PETERS LAW FIRM
P.O. Box 2796
Las Cruces, NM 88004
Tel.: (575) 526-2101
lep@leepeterslaw.com

Attorneys for Elephant Butte Irrigation District

No. 141 Original

In The
Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,
v.
STATE OF NEW MEXICO
and STATE OF COLORADO,
Defendants.

DECLARATION OF GEHRIG "GARY" LEE ESSLINGER

1. The undersigned, hereby makes the following unsworn declaration, under penalty of perjury, pertinent to the above styled and numbered cause:

2. My family settled in La Mesa, NM in 1912 as members of Elephant Butte Irrigation District (EBID) and has continuously farmed within the district since that time.

3. I have been employed by EBID, the Proposed Intervener, since 1978 in various capacities and currently serve as the General Manager of EBID. I was appointed Treasurer-Manager in 1988 by the EBID Board of Directors.

4. As General Manager, my duties include supervision of the general day to day operation of EBID. I oversee the departments of tax, maintenance, hydrology, operations, engineering, information technology, human resources and ground water resources.

5. With respect to the Rio Grande Project (Project), I am responsible for the interaction with the United States Bureau of Reclamation, the International Boundary and Water Commission and El Paso County Water Improvement District #1 with respect to carrying out EBID's contractual obligations with these parties.

6. I began employment with EBID in November 1978 as an inventory clerk. My main function was to implement the February 15, 1979 Transfer of the Operation and Maintenance of Project Works contract with the United States.

7. The 1979 Contract basically turned operation and maintenance of the entire drainage and distribution system on the Rio Grande Project (Project) located in New Mexico over to EBID. The only other structures remaining in the New Mexico portion of the Project which the United States was still conducting Operation and Maintenance on were the three diversion dams (Percha, Leasburg, and Mesilla) and Elephant Butte and Caballo dams and reservoirs.

8. With the 1979 Contract, United States personnel working on the drainage and distribution system were given notice that their job had been terminated. They were given the option of transferring, taking a job with EBID or retiring. Approximately 80 employees were terminated, reassigned or retired and all of those function formerly performed

by the United States to deliver water were turned over to EBID.

9. As a result of maintenance issues involving the 3 Project diversion dams in New Mexico, the United States and EBID entered into the May 31, 1989 contract where the United States transferred operation and maintenance responsibilities for the 3 diversion dams in the New Mexico portion of the Project to EBID. This included Percha, Leasburg and Mesilla dams. As a result of this contract, EBID now operated diversion dam gates which diverted water from the Rio Grande into the EBID canal system for El Paso County Water Improvement District #1 (Texas District) and Mexico. The United States role was reduced to just monitoring the releases and diversions made by EBID.

10. EBID's role in delivering Texas irrigation district water from the Rio Grande, at Mesilla dam, can be illustrated by example. Water diverted at Mesilla dam bound for the Texas irrigation district, once diverted by EBID at Mesilla dam, travels approximately 22 miles within NM in EBID canals until it reaches the headings of the Texas irrigation district in a part of their district they call the "Upper Valley". Part of that water is also placed into the East Side canal for use in Texas. Historically, part of that water was diverted for use at the Texas Federal Correctional Facility known as "La Tuna". The remainder of the Texas and Mexico order remains in the Rio Grande.

11. Title XXXIII of the Act of October 19, 1996, was historic in that it was the first time Congress had instructed the Secretary to deed back to an irrigation district the drainage and distribution system that it had paid for in its repayment contract. I personally testified in front of congressional committees as part of the process. The final deed conveying the drainage and distribution system to EBID was signed on January 19, 1996. Since that time, other irrigation districts in the West have now followed in EBID's footsteps. The United States still owns and operates Elephant Butte and Caballo dams and reservoirs that store Project water and release it for downstream use under the 2008 Operating Agreement Settlement described below.

12. Also in 1996, EBID begin the installation of monitoring stations in the canals, laterals and drains to provide data to monitor Project surface water that was to be delivered to EBID members, Texas irrigation district members and Mexico.

13. Paragraph 6d of the 1979 Transfer of O&M for Project Contract provided, "A detailed operation plan will be concluded between the United States and the District setting forth procedures for water delivery and accounting. No agreement was concluded until a settlement was reached in litigation with the United States and the Texas irrigation district.

14. On February 14, 2008 the United States and the two irrigation districts signed the Operating Agreement Settlement. The Operating Agreement Settlement is the procedure used by the districts and the United States to divide the Project water supply between the two districts.

15. Under the Operating Agreement Settlement, an Allocation Committee made up of representatives from the two districts and the United States meet and agrees on the allocation, to the two districts. Thereafter, the districts determine the release from Caballo reservoir for the orders from EBID, the Texas District and Mexico and specify the gate opening at Caballo reservoir to achieve the desired flow. EBID is solely responsible for determining the allocation that each of its members will receive.

16. The water, once released, flows downstream until it is diverted by EBID at one of the 3 diversion dams on the Rio Grande. EBID operates and maintains Percha, Leasburg and Mesilla diversion Dams under the 1989 Contract. Project water diverted by EBID at the diversion dams, flows thorough EBID laterals and canals to farmers in New Mexico, where the water is used for irrigation; EBID owns and operates the laterals, canals and drains, and makes all decisions concerning timing and amounts of water diversions and deliveries through the laterals and canals. EBID also makes the diversions at these

dams for delivery of water to the Texas district, Texas district farmers and Mexico.

17. A portion of Project water once used by the farmers within EBID is captured by drainage facilities that are owned and operated by EBID as it delivers to its upstream farmers. These drain return flows are then rediverted into the Rio Grande and become part of Project supply that is used by other farmers within EBID as well as by the Texas irrigation district. This process repeats itself until water is delivered in Texas. In a full allotment year, historically, a release of 790,000 acre feet has yielded a diversion of 960,000 acre feet due to the capture of return flows.

18. All water diverted at Percha and Leasburg dams is for delivery to EBID farmers. Diversions at Mesilla Dam are to make delivery to EBID farmers, direct delivery to Texas farmers that cannot be reached by the Texas district canal system, and delivery to the Texas district for distribution to its farmers and some EBID farmers who cannot be reached by EBID's canal system.

19. On August 9, 1995, EBID and the Texas irrigation district entered into a Joint Powers Agreement which set forth how EBID would deliver water to Texas irrigation district members in Texas. As required by the Joint Powers Agreement Act, the Agreement was also approved by the State of New Mexico on August 18, 1995. This Agreement has been

referred to as the 1995 6A/6B Contract. Under this contract, EBID employees drive across the state line in EBID vehicles and operate turnouts that deliver water to 2400 acres in Unit 6B and 1400 acres in Unit 6C in Texas. EBID also performs maintenance functions on canals, drains, laterals and diversion structures in Texas.

20. A diagram illustrating the release, diversion, delivery and management functions of EBID in the Project in New Mexico and Texas is attached to this Declaration.

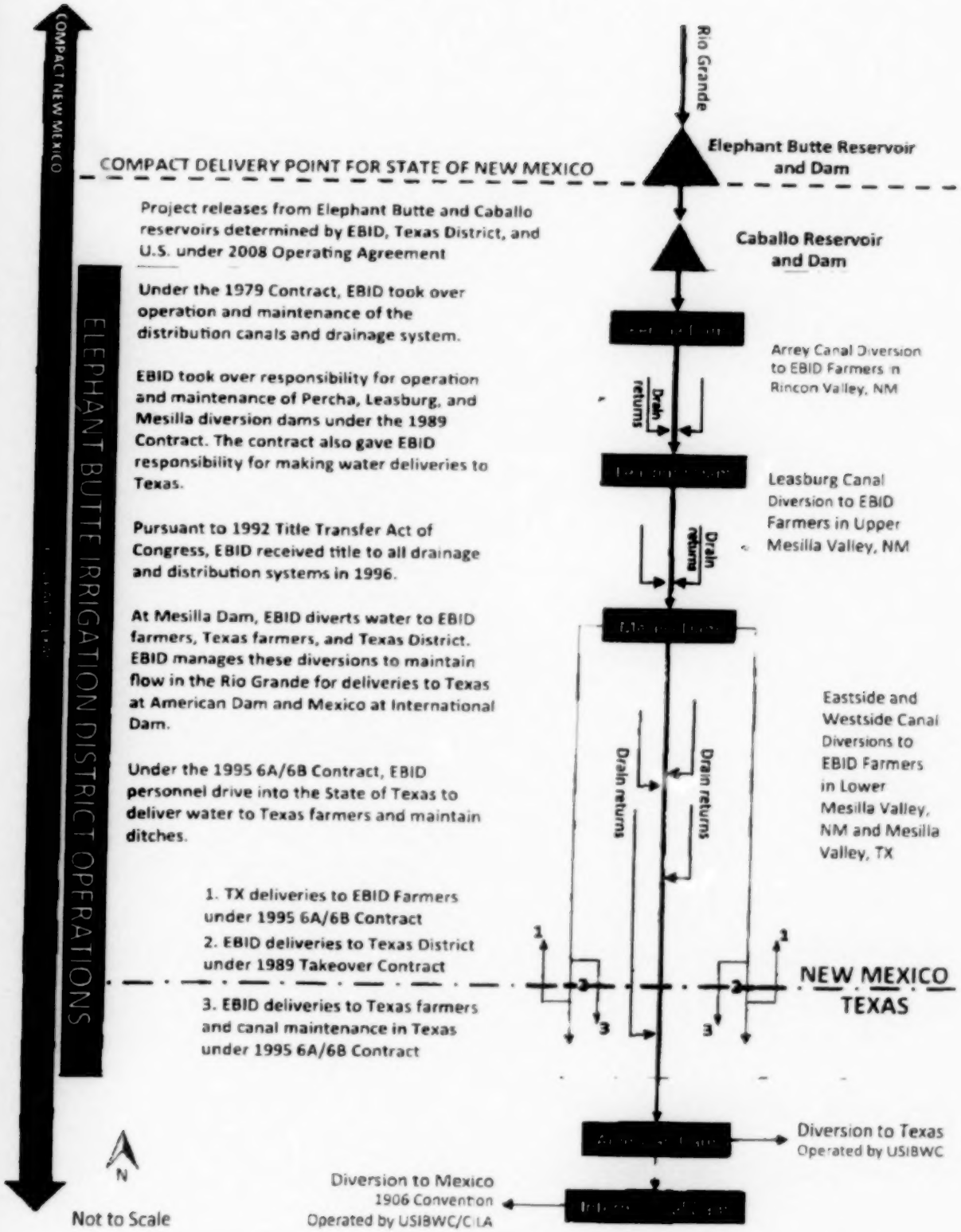
21. An example of how EBID delivers water for use in Texas can be illustrated by an example. If the Texas irrigation district wanted an order of 1,000 cfs for use in Texas, the two districts agree on a setting of the gate height for the opening of the gates at Caballo Reservoir that will meet the orders of EBID, Texas, and Mexico. The United States is given the gate settings which they carry out. Once the release of water is made, EBID has to monitor and divert water though Percha and Leasburg diversion dams as well as account for its own orders, and those of Texas and Mexico. When this 1000 cfs reaches Mesilla dam, based upon the Texas orders and Mexican orders, diversions of 150 cfs is made by EBID into the West Side canal system and 40 cfs into East Side canal system. A total of 190 cfs is in EBID's canal system that will be used in Texas. The remainder of the 1,000 cfs which is 810 cfs continues downstream in the Rio Grande for diversion in

> what the Texas district calls the Lower Valley, along with the water for delivery to Mexico.

I, Gehrig "Gary" Lee Esslinger, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed this 3 day of March 2015.

/s/ Gehrig Lee Esslinger
Gehrig "Gary" Lee Esslinger


COMPACT NEW MEXICO
ELEPHANT BUTTE IRRIGATION DISTRICT OPERATIONS
Rio Grande
Elephant Butte Reservoir and Dam
COMPACT DELIVERY POINT FOR STATE OF NEW MEXICO
Project releases from Elephant Butte and Caballo reservoirs determined by EBID, Texas District, and U.S. under 2008 Operating Agreement
Caballo Reservoir and Dam
Under the 1979 Contract, EBID took over operation and maintenance of the distribution canals and drainage system.
EBID took over responsibility for operation and maintenance of Percha, Leasburg, and Mesilla diversion dams under the 1989 Contract. The contract also gave EBID responsibility for making water deliveries to Texas.
Pursuant to 1992 Title Transfer Act of Congress, EBID received title to all drainage and distribution systems in 1996.
At Mesilla Dam, EBID diverts water to EBID farmers, Texas farmers, and Texas District. EBID manages these diversions to maintain flow in the Rio Grande for deliveries to Texas at American Dam and Mexico at International Dam.
Under the 1995 6A/6B Contract, EBID personnel drive into the State of Texas to deliver water to Texas farmers and maintain ditches.
Drain returns
Arrey Canal Diversion to EBID Farmers in Rincon Valley, NM
Leasburg Canal Diversion to EBID Farmers in Upper Mesilla Valley, NM
Eastside and Westside Canal Diversions to EBID Farmers in Lower Mesilla Valley, NM and Mesilla Valley, TX
1. TX deliveries to EBID Farmers under 1995 6A/6B Contract
2. EBID deliveries to Texas District under 1989 Takeover Contract
3. EBID deliveries to Texas farmers and canal maintenance in Texas under 1995 6A/6B Contract
NEW MEXICO
TEXAS
Diversion to Texas
Operated by USIBWC
Diversion to Mexico
1906 Convention
Operated by USIBWC/CILA
N
Not to Scale